Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

GLENDA E. WELCH and DOROTHY WELCH,

Petitioners,

v.

TOWN OF MOUNTAIN CITY, GRACE WATTS, CAROLYN HOLT, WILMA MCCRACKIN, DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a 42 U.S.C. § 1983 ("§ 1983") plaintiff required to exhaust her state judicial remedies before she is entitled to assert her claim in a federal district court; *i.e.*, have federal district courts in the Eleventh Circuit effectively surrendered their jurisdiction over § 1983 actions to state courts and serve merely to review the decisions of state courts?

II. Is a district court authorized to dismiss a § 1983 action based on *Younger*[1] *abstention* if: (a) none of the respondents asserted *Younger abstention*; (b) the briefs filed by respondents acknowledged that *Younger abstention* had been waived and was "moot;" (c) respondents moved for summary judgment on the merits, without mentioning *Younger abstention*; and (d) the recorder's court enters a written order staying further criminal prosecution by the City pending the district court's adjudication of the merits of the constitutional issues.

III. If *Younger abstention* applies in a case, is the district court authorized to ignore a record replete with evidence that the plaintiff falls within ***all*** of the exceptions articulated in *Younger*; *i.e.*, (a) bad faith prosecution or harassment; (b) prosecution under a facially unconstitutional ordinance; and (c) where petitioner is subject to multiple prosecutions for the same offense?

IV. Does the mere inclusion of a prayer for injunctive relief in a § 1983 action, where a TRO is not sought, negate an otherwise viable attack on a facially unconstitutional ordinance?

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1. *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

V. In a § 1983 action is the district court authorized to enter a ***sua sponte*** dismissal without any notice to the plaintiff as analogously required by sundry decisions of this Court interpreting dismissal under Rules 56(c) and 12(b)(6) of the Federal Rules of Civil Procedure?

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Petitioners, Glenda Welch and Dorothy Welch, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") rendered in this case.

OPINIONS BELOW

The opinion of the three judge panel of the Eleventh Circuit is not reported. (App. A). The opinion of the Eleventh Circuit on motion for en banc review and reconsideration is not reported. (App. D). The opinion of the United States District Court for the Northern District of Georgia is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on January 15, 1999. (App. A) The Eleventh Circuit denied a timely petition for en banc review/rehearing on March 9, 1999 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This Court is requested to grant certiorari because the Eleventh Circuit "has decided a federal question in a way that conflicts with relevant decisions of this Court" and has sanctioned the district court's departure "from the accepted and usual course of judicial proceedings . . . so as to call for an exercise of this Court's supervisory power."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any . . . ordinance . . . of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Background of the Case

The Town of Mountain City, Georgia, population 784[1], is located in the mountains of northeast Georgia. In 1986, a life-long resident, George Welch, then age 69, was convicted of a double murder of residents of Mountain City and sentenced to life imprisonment in Georgia. In 1994, Beuna Vista Welch, George Welch's wife of 56 years, died. Petitioners are two of the eleven children born to George and Beuna Vista Welch.

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1. 1990 census.

In March 1996, petitioners inquired of the City and county governments if there was any ordinance prohibiting the establishment of a family cemetery and were told by the county commission and the City's mayor that there were none. Relying on this information, petitioners and four of their siblings dedicated the Welch family cemetery located on the family homeplace by recorded deed. On March 8, 1996, a permit was issued to George Welch and Beuna Vista Welch was disinterred from the Blue Heights Baptist Church cemetery and reinterred in the Welch family cemetery.

On July 9, 1996, upon learning that George Welch had terminal cancer, and would soon die and be buried beside his wife, the City council enacted the Burial Ordinance, denominated as "Ordinance Prohibiting Interment of Deceased Persons in Private Cemeteries" ("the ordinance"). The ordinance effectively prohibited petitioners from burying their father next to their mother.

In derogation of Georgia law (OCGA § 50-14-1(d)), petitioners were given no notice of any kind that the council was considering the enactment of the ordinance or that it would vote on the matter on July 9, 1996. On August 1, 8, and 15, 1996, the City published a notice in the legal organ that it was "considering" the enactment of the ordinance, thus failing to give notice ***prior*** to the enactment of the ordinance as mandated by Georgia law (OCGA § 36-35-3).

On July 29, 1996, for the first time, petitioners learned of the enactment of the ordinance. George Welch died on August 1, 1996, at age 80, while still incarcerated. Fearful of paying a fine of $1,000 per day as provided by the ordinance, the local funeral home declined to bury George Welch. On August 4, 1996, petitioners, four of their siblings,

and many of their friends, crafted a wooden casket, purchased a vault, had the body embalmed, dug the grave site with shovels, held a funeral service and buried George Welch next to their mother. The City issued accusations against petitioners on the same day their father was buried.

B. The Proceedings Below

On March 26, 1997, petitioners brought a § 1983 action against the City, et al., alleging the ordinance to be a bill of attainder, facially void of any public purpose and therefore unconstitutional. Further, the complaint alleged that the enactment of the ordinance did not meet constitutional muster on due process and equal protection grounds (no notice or right to be head to petitioners or the public). The complaint sought, inter alia, to have the ordinance declared unconstitutional on sundry procedural and substantive grounds and sought injunctive relief.

On October 3, 1997, counsel for the parties met in chambers with the district court judge whereupon it was agreed that all parties would file motions for summary judgment and the City would cease any further criminal prosecution of petitioners pending a ruling by the district court on various constitutional issues. Pursuant to agreement of counsel, the City recorder's court entered an order on October 23, 1997 staying all further prosecution pending a ruling by the district court on the constitutionality of the ordinance. (App. C, 11a)

By December 3, 1997, all non pro se parties had moved for summary judgment; petitioners had also moved for declaratory judgment. On June 9, 1998, the district court, ***sua sponte***, entered its order summarily dismissing the complaint on the grounds that: (App. B)

1. Petitioners had impermissibly sought injunctive relief of a criminal prosecution in face of the decision of the this Court in *Younger*; (App. B, 7a-9a); and

2. "[P]laintiffs' claims are not yet ripe for this court's review" (*i.e.*, petitioners have not exhausted their state judicial remedies.) (App. B, 10a)

On January 15, 1999, the Eleventh Circuit affirmed the order of the district court without addressing any of the myriad issues raised in the appeal or to explain why:

1. *Younger abstention* was not affirmatively waived.

2. The facts of this case do not fall precisely within ***all three exceptions*** to the *Younger abstention*.

3. For the first time since April 20, 1871, a federal circuit has deferred to a city court the responsibility of enforcing a § 1983 claimant's rights under the federal constitution.

Petitioners timely filed an application for en banc review and reconsideration. On March 9, 1999, the Eleventh Circuit denied petitioners' application in an unpublished decision. (App. D) Petitioners appeal to this Court for relief from the errors committed by the district court and compounded by the Eleventh Circuit affirmance.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS ERRONEOUSLY HELD THAT PETITIONERS ARE REQUIRED TO EXHAUST THEIR STATE JUDICIAL REMEDIES BEFORE THEY ARE ENTITLED TO ASSERT A § 1983 CLAIM IN A FEDERAL DISTRICT COURT.

The district court's misconstruction of *Younger*, *supra*, is evinced in its order where it opined:

> In order to award petitioners the relief they seek, this court would have to declare that the Town of Mountain City's Ordinance is unconstitutional. Moreover, this court would have to determine that the state courts are incapable of enforcing the federal constitution in this respect . . . Accordingly, it appears to the court that petitioners' claims are ***not yet ripe for this court's review***. (emphasis supplied)

(App. B, 9a)

In the case at bar, the Eleventh Circuit simply chose to ignore its own controlling criteria for deciding which cases are *ripe for review*. In *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1574 (1989), the Eleventh Circuit opined that due process claims are ripe for review "the ***moment*** a governmental decision affecting his [or her] property has been made in a facially arbitrary and capricious manner." (emphasis supplied) It is hard to conceive of a case that

falls more clearly within the ambit of the *Greenbriar* language than the case at bar. It cannot be rationally argued that such disparate decisions promote the principle of stare decisis and public confidence in the continuity of the law.

In sustaining the district court in a two sentence decision, the Eleventh Circuit opined: (App. A, 2a)

> We affirm the district court's decision to invoke the *Younger v. Harris* doctrine and to abstain from exercising jurisdiction in this case. The Recorder's Court for Mountain City is fully capable of passing on the constitutional issues appellants have raised.[2]

Petitioners asked the district court to protect rights accruing to them under the United States Constitution and a ***federal*** statute. Instead of hearing the matter on its merits, the district court ruled that petitioners must look to the recorder's court for protection of their rights under § 1983. How is it presumed that a district court or a federal court of appeals advances justice when they defer the enforcement of federally created rights to a recorder's court or to any other state court? What powers does a recorder's court have to invalidate a town's ordinance on constitutional grounds? Does *Younger* require an aggrieved party to litigate through the state courts, ad nauseam, before she is allowed to seek enforcement of a federal statute in a federal district court? Such a scenario does not supports judicial economy and effectively precludes access to the federal courts of all but the wealthiest persons.

This Court and the Eleventh Circuit have consistently held that exhaustion of state remedies is not a prerequisite

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2. Under Georgia law, a recorder's court judge is not required to be a member of the bar or to have any legal training whatsoever.

to an action under § 1983. *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S. Ct. 2364, 2369, 129 L. Ed. 2d 383 (1994); *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501, 102 S. Ct. 2557, 2560, 73 L. Ed. 2d 172 (1982); *Tinney v. Shores*, 77 F.3d 378, 382 (1996); *Majette v. O'Connor, et al.*, 811 F.2d 1416, 1417 (1987).

The Eleventh Circuit simply chose to ignore the binding precedent of the above-cited decisions of this Court, as well as its own. The drastic decision by the district court, affirmed with a two-sentence unpublished decision by the Eleventh Circuit, stands for the proposition that § 1983 actions are to be litigated in the state courts and then brought to the district court for "review,"[3] a procedure not followed in any federal circuit.

II.

THE PETITION SHOULD BE GRANTED BECAUSE *YOUNGER* ABSTENTION WAS AFFIRMATIVELY WAIVED.

Younger abstention is not applicable if the prosecution is being carried out in bad faith, to harass the petitioner, involves multiple prosecutions, or the statute is facially unconstitutional. While the facts of the case at bar easily distinguish it from *Younger*, in any event, petitioners fall within the purview of all of the *Younger abstention* exceptions.

At no time during the fifteen month that ensued from the filing of the complaint on March 26, 1997 and the entry

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3. App. B, 10a.

of the district court's order of dismissal on June 9, 1998, did any defendant refer to *Younger* in any pleading, motion, brief or any other paper. The district court recognized this fact when it opined that ***"[a]lthough several motions are now pending before the court, neither party has addressed Younger abstention."*** (emphasis added) (App. B, 7a)

When counsel met in chambers on October 3, 1997, they agreed that all criminal proceedings would abate pending the district court's ruling on their respective motions for summary judgment which each agreed to file. On October 23, 1997, the recorder's court entered its order staying further prosecution of petitioners pending a ruling by the district court on the constitutionality of the ordinance, citing the agreement between the parties as the basis for its stay of the criminal proceedings. (App. C, 11a) Accordingly, none of the parties saw any need for address *Younger abstention* — it had been waived.

Thus, petitioners could not have anticipated the district court would dismiss petitioners' action on the basis of *Younger abstention*, the very issue which counsel had eliminated from the case in order that it could proceed to address the myriad constitutional issues raised in the complaint.

If *Younger abstention* was not waived, why did respondents go to the trouble and expense of filing two motions for summary judgment seeking adjudication of the constitutional issues on the merits and never mentioning *Younger*? If *Younger abstention* remained as an issue, respondents could have simply moved to dismiss the case at any time during the ensuing 15 months after it was filed.

Standing alone, respondents' respective summary judgment motions seeking a ruling on the merits of the constitutional issues, constitute a waiver of *Younger abstention*. In its summary judgment brief, the City acknowledged that it "[agreed] to abate the Recorder's Court proceeding pending some direction from the Federal District Court." This is the City's euphemistic way of saying that *Younger abstention* had been waived.

Lest this Court have any remaining doubt that respondents waived *Younger abstention* and that its present position is an afterthought, witness the telling quote from page 2 of the City's summary judgment motion brief (filed ***without*** the benefit of hindsight based on the district court's misplaced dismissal order):

> ***As an initial consideration, the request to enjoin the Rabun County Recorder's Court proceedings is a moot issue. All parties have previously agreed to stay the Rabun County Recorder's Court prosecution pending the outcome of the instant litigation.*** (emphasis supplied)

This Court has long recognized that *Younger abstention* is not jurisdictional and that litigants may remove it as an issue. *Brown v. Hotel Employees*, 468 U.S. 491, 500, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904, 52 L. Ed. 2d 513 (1977); *Sosna v. Iowa*, 419 U.S. 393, 396-397, n.3, 95 S. Ct. 553, 555-556, 42 L. Ed. 2d 532 (1975)

The Eleventh Circuit recognized *Younger abstention* waiver in *Falanga, et al. v. State Bar of Georgia*, 150 F.3d

1333 (11th Cir. (Ga. 1998)) *Falanga* held that an agreement by the litigants to suspend further prosecution by the State Bar of Georgia pending a ruling by the district court on the petitioners' constitutional attack, removed the abstention issue from consideration on appeal. In deciding *Falanga*, the Eleventh Circuit, citing *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) observed that "Younger abstention is not jurisdictional." There is little protection for litigants when a court is allowed to exercise discretion where it has none. Equal protection mandates consistent application of the law. Petitioners are entitled to the same protection under the law that was afforded Mr. Falanga; this is the essence of equal protection. This Court simply should not allow the Eleventh Circuit to capriciously deny the manifest waiver of *Younger abstention* in this case.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS IGNORED A RECORD REPLETE WITH EVIDENCE THAT THE PETITIONERS FALL WITHIN *ALL* OF THE EXCEPTIONS ARTICULATED IN *YOUNGER*.

In *Younger*, this Court enunciated three exceptions to the abstention principle and petitioners fall within the ambit of all of these exceptions; to wit:

(1) Where the petitioner will be subjected to repeated prosecution for the same offense (*Younger*, 401 U.S. at p. 49);

(2) Where the law is facially unconstitutional (*Younger*, 401 U.S. at p. 50);

(3) Where the petitioner is being harassed or prosecuted in bad faith (*Younger*, 401 U.S. at p. 49).

A. Repeated Prosecutions

Section 2 of the ordinance provides as follows (App. E, 15a):

> Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense shall be deemed committed on each day during or which a violation occurs or continues.

Thus, petitioners face fines of $1,000 per day for the last two years and nine months, a present total exceeding $2,000,000. More importantly, the ordinance provides that as long as the body remains buried in violation of the ordinance, the offense is continuing. Consequently, there is nothing to prevent Mountain City from prosecuting petitioners ***ad nauseam***, clearly bringing this matter within the ambit of the "repeated prosecution" exception proscribed in *Younger*, 401 U.S. at p. 49.

B. Facial Unconstitutionality

The ordinance is facially unconstitutional and thus, this case falls within the abstention exceptions promulgated in *Younger* at pp. 53-54 and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 95 S. Ct. 1200, 1212, 43 L. Ed. 2d 482 (1975).

An ordinance which does not substantially relate to the public health, safety, morals, or general welfare ***is not*** a

valid exercise of a municipality's police power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926). An ordinance satisfies this substantive-due-process test if it serves some public purpose, the means adopted by the ordinance are reasonably necessary for the accomplishment of the purpose, and it is not unduly oppressive upon the persons regulated. *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385 (1894); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); 1 *Ziegler*, Rathkopf's The Law of Zoning and Planning, Sec. 3.01 [1]; *Stoebuck*, Police Power, Takings, and Due Process, 37 Washington and Lee L. Rev. 1057, 1058 (1980).

The preamble to the ordinance cites two reasons for not allowing the burial of "deceased" persons in private cemeteries with four or less graves; to wit: (App. E, § 1, 14a)

(1) "to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deceased persons on private property;" and

(2) "to prohibit any adverse economic effects on future development and to protect future development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property."

During the discovery process, the City admitted:

(1) It never consulted any experts, reviewed any scientific data, or conducted research into the need for the ordinance.

(2) The council did not discuss the merits of the ordinance or offer any amendments prior to the vote.

(3) The council did not discuss the merits of the ordinance, is unaware of the number of cemeteries located within its corporate limits, and has never inspected any cemetery or grave.

1. *Health and Safety*

In order for the ordinance to meet constitutional muster, the City must show that it is not an arbitrary fiat as contended by the petitioners, but that it enhances the legitimate health and safety interests of its citizenry. The law looks to substance — not form; the law looks at what, if anything, an ordinance actually accomplishes for the public good. In judging the constitutionality of an ordinance, the reviewing court is not bound by the laudable verbiage of its preamble.

There simply is no scientific support for the proposition that it is "dangerous" to bury a properly embalmed body in a grave, regardless of where the grave is located or who owns the cemetery. No rational argument can be advanced for the City's proposition that a burial in a church, synagogue or government cemetery is healthier or safer than burial in a private cemetery.

If the City had enacted an ordinance requiring that all bodies be embalmed by a licensed mortician, or that cemeteries be properly maintained, or that funeral processions have police escorts, such an ordinance would constitute a valid exercise of its police powers since these matters legitimately relate to valid health and safety

concerns. But the ordinance simply does not address any such issue or any other legitimate issue related to health or safety. As the unrefuted evidence in the record shows, the ordinance was intentionally calculated to apply only to one existing private cemetery; *i.e.*, the Welch family cemetery.

Under the ordinance, all "established cemeter[ies]" are exempted. An "established cemetery" is defined as "any cemetery existing at the time this ordinance is enacted and containing five graves or more." (App. E, § 1, 15a) Arguendo, if it is dangerous, detrimental or unhealthy to bury ***four*** or less "deceased" persons in a private cemetery, then it rationally follows that burying ***five*** or more "deceased" persons in a private cemetery is even ***more*** dangerous, detrimental or unhealthy. Under the rationale of the ordinance, a private cemetery with four graves poses a health and safety problem, but the problem miraculously dissipates as soon as a fifth grave is added.

Petitioners have attacked the ordinance on the grounds that it is facially whimsical, irrational and arbitrary. Once petitioners demonstrated that the provisions of the ordinance had no rational relationship to the health, safety or economics of the Town of Mountain City, the onus shifted to the City to come forward with evidence that the ordinance "substantially" relates to the health, safety or economics and that the five grave minimum is not arbitrary. *Nasser v. City of Homewood*, 671 F.2d 432, 434 (11th Cir. 1982). The record reflects that the City has not attempted to offer any such evidence.

In reviewing the constitutionality of another ordinance based upon the exercise of municipal police powers, the Georgia Supreme Court wisely opined:

> [a]n ordinance which makes criminal such perfectly normal, acceptable, lawful, innocent and innocuous behavior, is an affront to justice and a total aberration from our concept of ordered liberties.

Bullock v. City of Dallas, 281 S.E.2d 613, 614, 248 Ga. 164 (1981).

The ordinance has no scientific, intellectual or empirical basis; it is transparently arbitrary, and thus, it is an invalid exercise of municipal police powers. The ordinance does nothing whatsoever to promote the welfare of any citizen and the inclusion of the buzzwords "health" and "safety" are meaningless. Substantively, the ordinance is constitutionally dead and no amount of verbal posturing in its preamble can breathe the breath of legitimacy into it.

2. *Economic Development*

According to its preamble, the ordinance is intended "to prohibit any adverse economic effects in future development and to protect future development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property." Obviously, if the creation of a cemetery has an adverse economic influence on the community, it matters not whether the cemetery is owned by a government entity, a "church," a "synagogue," or by private interests.

Under the rationale of the ordinance's preamble, a private cemetery with four or less graves adversely affects the community, but a private cemetery with five or more graves does not adversely effect the community and a

private cemetery with four or less graves adversely affects the community, but a government cemetery or a "church" or "synagogue" cemetery does not adversely effect the community, regardless of the number of graves it has. The ordinance simply does not relate to the general welfare of the City to any degree and thus, is not a valid exercise of a municipality's police power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

C. Bad Faith Prosecution — Harassment

The district court opined "there is no allegation that petitioners have been mistreated in the state criminal proceedings." (App. B, 9a) The complaint succinctly alleges a conspiracy between the mayor, two members of the city council and three private persons to enact a facially unconstitutional ordinance prohibiting the burial of petitioners' father beside their mother in a family cemetery. How much mistreatment should a citizen be expected to tolerate at the hands of government before it rises to the level of "mistreatment." and the judicial system decides to afford her constitutional protection?

In *Gibson v. Berryhill*, 411 U.S. 564, 577-578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973), this Court affirmed a district court's injunction to stop proceedings before a state administrative board on the ground that petitioners had shown bias on the part of the administrative body. *Younger* does not stand for the proposition that citizens whose constitutional rights have been intentionally and blatantly violated by a municipality must wait for a judge employed by that municipality to adjudicate their guilt or innocence before they are authorized to bring an action under § 1983 in a federal district court.

In violation of the Fourteenth Amendment, petitioners are being selectively prosecuted under the ordinance since the City admits to knowing the identity of fifteen other ***active*** participants[4] in the burial of George Welch, but it has taken no steps to prosecute any persons other than petitioners. Selective prosecution is *prima facie* proof of governmental bad faith.

The ordinance is an *ex post facto* law or retroactive law applicable only to an easily identifiable group of people; *i.e.*, petitioners and four of their siblings. Accordingly, the ordinance is a bill of attainder. A bill of attainder is *prima facie* proof of governmental bad faith.

Petitioners have demonstrated that this case falls within the "harassment" or "bad faith" exceptions enunciated in *Younger*. Moreover, petitioners will be not be afforded a jury trial, but will be tried in a town with a population of 784 by a judge who serves at the pleasure of a mayor and two council members who are respondents in this § 1983 action. It is hard to imagine a case which more clearly cries out for adjudication by a neutral court; *i.e.*, a federal district court.

---

4. Petitioners furnished the City with photographs depicting the 15 other people actively participating in the burial.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE MERE INCLUSION OF A PRAYER FOR INJUNCTIVE RELIEF IN A § 1983 ACTION, WHERE A TRO IS NOT SOUGHT, SHOULD NOT NEGATE AN OTHERWISE VIABLE ATTACK ON A FACIALLY UNCONSTITUTIONAL ORDINANCE.

Assuming arguendo that *Younger abstention* was not waived by respondents, what could be the rationale for the district court's dismissal of the complaint in toto? The interests of justice and judicial economy would be far better served by the dismissal of the sole count of the complaint seeking injunctive relief and leaving intact the constitutional issues set forth in the remaining counts. Why euthanize the patient because one of his arms has to be amputated? Given the liberal construction of pleadings under the Federal Rules of Civil Procedure and the presumption of the sufficiency of pleadings when a plaintiff is confronted with a motion to dismiss or for judgment on the pleadings, how can the dismissal of petitioners' complaint be rationalized.

V.

THE PETITION SHOULD BE GRANTED BECAUSE FUNDAMENTAL DUE PROCESS REQUIRED THE DISTRICT COURT TO GIVE A PLAINTIFF PRIOR NOTICE OF ITS *SUA SPONTE* DISMISSAL.

By analogy to the *sua sponte* entry of summary judgment by the trial court under Rule 56, a district court is required by fundamental due process considerations to alert a plaintiff of its intention to dismiss and to afford her an

opportunity to be heard before taking the drastic step of dismissal. *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417, 1418 (11th Cir. 1997) This principle of basic fairness has also been applied to *sua sponte* dismissals under Rule 12(b)(6). *Mitchell v. Farcass*, 112 F.3d 1483, 1492 (11th Cir. 1997)

VI.

PROCEDURAL DUE PROCESS VIOLATIONS.

A. No Notice — No Hearing

No notice was given to the petitioners that a ordinance prohibiting the burial of their father next to their mother would be discussed or voted upon at the July 9, 1996 council meeting. When petitioners learned of the ordinance on July 29, 1996, it was a ***fait accompli***. Presumably, 89 years after it was chartered, the City was suddenly experiencing a health and safety crisis brought about by burials in private cemeteries and intended to stop this menace.

Recall that public notice of the council's vote on the ordinance was advertised in the legal organ ***after*** the ordinance was enacted. Although, it is undisputed that the City was aware of the pending burial of George Welch in the Welch family cemetery, the City did not give petitioners any notice that such an ordinance would be voted upon by the council.

> An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.

Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940); *accord Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 614, 34 S. Ct. 443, 58 L. Ed. 751 (1914); *Roller v. Holly*, 176 U.S. 398, 409, 20 S. Ct. 410, 44 L. Ed. 520 (1900).

CONCLUSION

By affirming the district's court decision that the case was "not ripe for this court's review," the Eleventh Circuit has adopted the unprecedented position that § 1983 claimants must litigate their federal rights in the state court and that a district court sits merely to "review" the decisions rendered by the state court. The Eleventh Circuit's affirmance of the district court's order is contrary to the controlling decisions of this Court and the Eleventh Circuit cited in this petition.

By agreement of counsel, as well as the recorder's court order staying further criminal prosecution of petitioners pending a ruling by the district court, the parties had obviated the need for the district court to deal with the injunctive issues pending its ruling on the constitutional issues. Yet, the district court choose to ignore this affirmative waiver of *Younger abstention* and proceeded to dismiss petitioners' viable § 1983 action, *sua sponte*, depriving petitioners and on their right to be heard on the matter. Surely *Younger* does not envision this kind of unnecessary dismissal of a viable § 1983 claim. Such a scenario hardly aids in the orderly administration of justice, the promotion of judicial economy or public confidence in the judicial system.

Arguendo, if *Younger abstention* applies, petitioners clearly fall within the ambit of the exceptions this Court enumerated in *Younger*. Petitioners are being selectively prosecuted and harassed in bad faith by the City under a facially unconstitutional ordinance, unrelated to public health, welfare or safety.

Arguendo, if *Younger abstention* applies in this case ***and*** petitioners do not fall within any of the exceptions, justice and judicial economy would be far served by a mere dismissal of the one count seeking injunctive relief, rather than a dismissal of the complaint in toto. Such a dismissal is contrary to myriad controlling law holding that actions should not be dismissed unless there is no legal theory under which the plaintiff can recover. There simply is no rationale for such a draconian result.

By analogy to controlling case law involving the *sua sponte* entry of summary judgment under Rule 56 and dismissals under Rule 12(b)(6), a district court is required by fundamental due process to alert petitioners of its intention to dismiss and to afford them an opportunity to be heard before taking the drastic step of dismissing their case.

Despite the undisputed fact that the City was well aware of petitioners' property rights in their father's body and in their family cemetery, petitioners were given no notice and no opportunity to be heard concerning the ordinance. The City published notice that it was "considering" enactment of the ordinance ***after*** the enactment of the ordinance is contrary to Georgia law, in addition to being false.

The ordinance was enacted for a singular purpose — to prevent the burial of George Welch beside his wife. In

enacting the ordinance, the City sought to visit the sins of a father upon his children. The ordinance is transparently a bill of attainder, directed toward an "easily identifiable group of people;" *i.e.*, petitioners and four of their siblings. The ordinance applies to one cemetery — the Welch family cemetery.

Accordingly, petitioners respectfully urge this Court to grant certiorari.

Respectfully submitted,

GARY C. HARRIS
Attorney for Petitioners
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(770) 351-9050

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 15, 1999 (PUBLISHED AS 168 F.3d 507 (1999))

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8775
Non-Argument Calendar

D.C. Docket No. 2:97-CV-036-WCO

GLENDA E. WELCH; DOROTHY WELCH,

Plaintiffs-Appellants

versus

TOWN OF MOUNTAIN CITY; GRACE WATTS; CAROLYN HOLT; WILMA MCCRACKIN, in their representative capacities as mayor and members of the council of the Town of Mountain City, respectively; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 15, 1999)

BEFORE TJOFLAT, ANDERSON and MARCUS, Circuit Judges.

Appendix A

PER CURIAM:

We affirm the district court's decision to invoke *Younger v. Harris* doctrine and to abstain from exercising jurisdiction in this case. The Recorder's Court for Mountain City is fully capable of passing on the constitutional issues appellants have raised.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION DATED AND FILED JUNE 9, 1998 AND ENTERED JUNE 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CIVIL NO. 2:97-CV-36-WCO

GLENDA E. WELCH and DOROTHY WELCH,

Plaintiffs,

v.

TOWN OF MOUNTAIN CITY; GRACE WATTS, CAROLYN HOLT and WILMA McCRACKIN, in their representative capacities as Mayor and Members of the Council of the TOWN OF MOUNTAIN CITY, respectively; GRACE WATTS, CAROLYN HOLT and WILMA McCRACKIN, in their individual capacities; DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Defendants.

ORDER

The captioned case is before the court for consideration of defendants Town of Mountain City, Grace Watts, Carolyn Holt, and Wilma McCrackin's motion for summary

judgment [21-1], plaintiffs' notion for declaratory judgment and injunctive relief [24-1, 24-2], plaintiffs' motion for summary judgment [25-1], defendants Daisy Mae Thompson and Robert Cecil Welch's motion for summary judgment [29-1], plaintiffs' motion to strike portions of affidavits filed in support of defendants' motions for summary judgment [36-1], plaintiffs' Rule 56(f) motion [37-1], plaintiffs' motion to compel discovery from Daisy Mae Thompson [38-1], plaintiffs' motion to compel discovery from Watts, Holt, and McCrackin [39-1], and plaintiffs' motion to compel discovery from Mountain City [40-1].

Facts

On March 8, 1996, plaintiffs buried a family member on their property located within the city limits of the Town of Mountain City.

On July 9, 1996, the city council of the Town of Mountain City passed the Burial Ordinance which is at issue in this case. The Burial Ordinance provides:

> WHEREAS, the city council of the City of Mountain City, Georgia desires to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deceased persons on private property or the establishment of cemeteries on private property; and

Appendix B

WHEREAS, the city council of the City of Mountain City, Georgia hereby desires to prohibit any adverse economic effects on future development and to protect future economic development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property.

NOW THEREFORE, the following ordinance is hereby enacted:

SECTION I

It shall be unlawful for any person, firm, or corporation to establish a cemetery or to bury or inter any deceased person within the city limits except in an established cemetery. The term "established cemetery" shall mean any cemetery existing at the time this ordinance is enacted and containing five graves or more.

This ordinance shall not apply to the following:

a. Creation and establishment of a governmentally owned cemetery or a church or synagogue cemetery or interment in a governmentally owned cemetery or church or synagogue cemetery, or

b. Establishment of or interment in a perpetual care cemetery licensed by the State of Georgia and created pursuant to the provisions of O.C.G.A. Section 44-3-130.

Appendix B

Section 2

> Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense shall be deemed committed on each day during or which a violation occurs or continues.

Burial Ordinance.

On August 4, 1996, with knowledge that the Burial Ordinance was in effect, plaintiffs, and others, buried another family member on their property. On that same day, Mountain City issued Accusations Nos. 6914 and 6915 charging plaintiffs with a violation of the Burial Ordinance. The accusations were dismissed on October 29, 1996. On December 11, 1996, Mountain City issued Accusations Nos. 97-01-0003 and 97-01-0007 against plaintiffs for violation of the Burial Ordinance.

Defendants represent to the court that the parties have agreed to stay the proceedings in the Recorder's Court for the City of Mountain City pending the outcome of the instant litigation. A copy of the order directing the stay, signed by Judge Russell W. Smith, is attached to defendants' response to plaintiffs' motion for summary judgment.

Plaintiffs filed the instant action against defendants under 42 U.S.C. §§ 1983 and 1988. Plaintiffs assert that they are being denied, under color of law, their constitutional rights accruing to them, under the Fifth, Eighth and

Fourteenth Amendments to the United States Constitution. Plaintiffs move for declaratory judgment and injunctive relief. Plaintiffs move the court to declare substantively that the Burial Ordinance is facially violative of the Fifth and Fourteenth Amendments to the United State Constitution. Plaintiffs further move the court to enjoin Mountain City from prosecuting plaintiffs and from using public funds to defend the individual defendants. Plaintiffs also move for summary judgment on their denial of due process claim, their bill of attainder claim, their "estoppel-vested rights claim," and their selective prosecution claim.

Defendants Town of Mountain City, Grace Watts, Carolyn Holt, and Wilma McCrackin move for summary judgment on all plaintiffs' claims. Defendants Daisy Thompson and Cecil Welch also move for summary judgment on all plaintiffs' claims. Defendant Phyllis Welch Blalock is proceeding pro se and has no motions pending before the court.

The court held a conference in this matter on October 3, 1997. During the conference, the court questioned counsel as to the application of *Younger v. Harris*, 401 U.S. 37 (1971). Although several motions are now pending before the court, neither party has addressed Younger abstention. Because Younger abstention requires federal district courts to abstain from exercising jurisdiction under certain circumstances, the court will address the issue *sua sponte*.

Legal Analysis

Under traditional equitable principles for injunctive relief and in the interest of federal and

> state comity, the Supreme Court established that federal courts should not intervene in an ongoing state criminal prosecution, "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This "settled law," intended to preserve the independence of our concurrent judicial systems, requires "our sensitive consideration of ongoing proceedings in state courts" and "that a federal court 'tread lightly' when a state proceeding is already underway." *Blalock v. United States*, 844 F.2d 1546, 1549 (11th Cir. 1988) (per curiam); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173 (11th Cir. 1982).

The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1507-08 (11th Cir. 1991).

"Under *Younger v. Harris* and its progeny, federal district courts must refrain from enjoining pending state court proceedings except under special circumstances." *Old Republic Union Ins. Co. v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1261 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1363 (1998). In *Samuels v. Mackell*, 401 U.S. 66, 73 (1971), the Supreme Court extended the principles of *Younger* to apply to declaratory judgments that would effectively enjoin state proceedings. *Id.*

Plaintiffs in this case are currently being prosecuted in the Recorder's Court for the City of Mountain City, State

of Georgia. As stated above, plaintiffs are charged with violations of the Burial Ordinance. Plaintiffs filed the instant action several months after the state court prosecution was commenced. Plaintiffs move this court to enjoin the state court criminal prosecution and declare the statute unconstitutional. The court finds that this case directly implicates the principles of *Younger v. Harris.*

The court has no reason to believe that plaintiffs would not be afforded adequate protection if they raised their constitutional challenge to the Burial Ordinance in the Recorder's Court. Although accusations have been issued against plaintiffs, there is no allegation that plaintiffs have been mistreated in the state criminal proceedings. The court is aware of no procedural barrier which would prevent plaintiffs from raising their constitutional challenge as a defense to the criminal prosecution.

In considering the principles of comity, the court finds that this case involves the exact situation against which *Younger* counsels. In order to award plaintiffs the relief they seek, this court would have to declare that the Town of Mountain City's Burial Ordinance is unconstitutional. Moreover, this court would have to determine that the state courts are incapable of enforcing the federal constitution in this respect.

Accordingly, based upon the foregoing discussion, the court finds that *Younger v. Harris* requires that this court refrain from exercising jurisdiction over plaintiffs, claims for declaratory and injunctive relief.

Appendix B

In considering the remainder of plaintiffs' claims and requests for relief, the court finds that plaintiffs' damages, if any, are undeterminable at this time given the pending criminal prosecution. Accordingly, it appears to the court that plaintiffs' claims are not yet ripe for this court's review.

Summary

Accordingly, the plaintiffs' complaint is hereby DISMISSED pursuant to *Younger v. Harris*. All pending motions are hereby DENIED AS MOOT [21-1, 24-1, 24-2, 25-1, 29-1, 36-1, 37-1, 38-1, 39-1, 40-1].

IT IS SO ORDERED this 9th day of June, 1998.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APPENDIX C — ORDER OF THE RECORDER'S COURT FOR THE CITY OF MOUNTAIN CITY STAYING CRIMINAL PROSECUTION PENDING ADJUDICATION OF THE CONSTITUTIONAL ISSUES BY THE FEDERAL DISTRICT COURT DATED OCTOBER 23, 1997

IN THE RECORDER'S COURT
FOR THE CITY OF MOUNTAIN CITY
STATE OF GEORGIA

ACCUSATION NUMBERS:
97-01-0003, 97-01-0007

CITY OF MOUNTAIN CITY, GEORGIA,

– vs –

GLENDA E. WELCH and DOROTHY HAMRICK
A/K/A DOROTHY WELCH,

Defendant.

ORDER

By agreement of the parties, the above-styled case is continued until such time as an order is issued on the pending Motion(s) for Summary Judgment in the United States District Court a the civil case pending between the parties.

SO ORDERED this 23rd day of October, 1997.

s/ Russell W. Smith, Judge
Pro Hac Vice
Mountain City Recorder's Court

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 9, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-8775

GLENDA E. WELCH; DOROTHY WELCH,

Plaintiffs-Appellants,

versus

TOWN OF MOUNTAIN CITY; GRACE WATTS; CAROLYN HOLT; WILMA MCCRACKIN, in their representative capacities as mayor and members of the council of the Town of Mountain City, respectively; et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion, 168 F.3d 507 (1999)).

Before: TJOFLAT, ANDERSON and MARCUS, Circuit Judges.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — BURIAL ORDINANCE DATED JULY 9, 1996

ORDINANCE PROHIBITING INTERMENT OF DECEASED PERSONS IN PRIVATE CEMETARIES

The following ordinance is enacted by the city council of the City of Mountain City, Georgia for the purposes of prohibiting the interment and burial of deceased persons on private property or the establishment of a cemetery and said ordinance is enacted as follows:

WHEREAS, the city council of the City of Mountain City, Georgia desires to prohibit conditions dangerous to the lives of citizens and property owners and detrimental to the health of citizens and public safety caused by interment of deemed persons on private property or the establishment of cemeteries on private property; and

WHEREAS, the city council of the City of Mountain City, Georgia hereby desires to prohibit any adverse economic effects on future development and to protect future economic development from effects caused by the creation of cemeteries or the burial of deceased persons upon private property.

NOW THEREFORE, the following ordinance is hereby enacted:

SECTION 1

It shall be unlawful for any person, firm, or corporation to establish a cemetery or to bury or

inter any deceased person within the city limits except in an established cemetery. The term "established cemetery" shall mean any cemetery existing at the time this ordinance is enacted and containing five graves or more.

This ordinance shall not apply to the following:

a. Creation and establishment of a governmentally owned cemetery or a church or synagogue cemetery or interment in a governmentally owned cemetery or church or synagogue cemetery, or

b. Establishment of or interment in a perpetual care cemetery licensed by the State of Georgia and created pursuant to the provisions of O.C.G.A. Section 44-3-130.

SECTION 2

Any person, firm or corporation violating any provision of this ordinance shall be fined not more than one thousand dollars for each offense and a separate offense, shall be deemed committed on each day during or which a violation occurs or continues.

Enacted, on this 9th day of July, 1996

Appendix E

City of Mountain City, Georgia

s/ Grace Watts
Grace Watts, Mayor

Attested to by:

s/ James M. Law
James M. Law, City Clerk

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-1965

IN THE

Supreme Court of the United States

GLENDA E. WELCH and DOROTHY WELCH,

Petitioners,

v.

TOWN OF MOUNTAIN CITY, GRACE WATTS, CAROLYN HOLT, WILMA McCRACKIN, DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF MOUNTAIN CITY

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STATEMENT OF THE CASE AND FACTS

Respondent Town of Mountain City submits that the district court opinion contains an accurate statement of the facts relevant to the issues on appeal (R4-47). Petitioners have not challenged any portion of the statement of facts set out by the District Court. Therefore the district court's finding of facts should be controlling on this appeal. Respondent Town of Mountain City further points out that the order on appeal is grounded on a procedural legal issue, and that the only facts pertinent to this appeal are those stated by the district court. Petitioners' brief is loaded with matters extraneous to the singular issue on appeal, including Petitioners' Statement of Facts .

The relevant facts as found by the district court show that Petitioners Glenda E. Welch and Dorothy Hamrick a/k/a Dorothy Welch are the daughters of George and Buena Vista Welch.

Petitioners' mother died July 6, 1994, and was buried in a church cemetery at the time of her death. Her body was later re-interred in the "Welch Family Cemetery" which was an area designated by Dorothy Hamrick on property owned by Dorothy Hamrick. This "family cemetery" was established by Dorothy Hamrick executing an undated warranty deed conveying the property to herself for the express purpose of dedicating the property for use as a family cemetery. This deed was recorded on March 14, 1996.

Buena Vista Welch's body was interred in the family cemetery prior to the enactment of a burial ordinance by Mountain City Council on July 9, 1996. The Ordinance,

passed July 9, 1996, "Prohibiting Interment of Deceased Persons in Private Cemeteries," prohibits the interment and burial of deceased persons on private property or the establishment of cemeteries on private property and provides for punishment for violation of the ordinance in the nature of a fine.

Following the enactment of this ordinance, Glenda Welch and Dorothy Welch Hamrick's father, George Welch, died August 1, 1996. Petitioners were aware of the ordinance prohibiting the burial of their father in the "family cemetery" on the private property of Dorothy Welch. They knowingly and voluntarily proceeded to bury their father on August 3, 1996, with knowledge of the ordinance expressly prohibiting the act of interment on private property.

On August 4, 1996, the Mountain City Police Department issued a Citation and Accusation to Glenda Welch and one to Dorothy Hamrick for the offense of "interment on private property in violation of Ordinance 7-96-1." (Appellants' #8 Excerpts Complaint, Exhibit H). These accusations were dismissed on October 19, 1996, and the City again issued accusations against Welch and Hamrick for violation of the burial ordinance, on December 11, 1996 (R4-47).

Welch and Hamrick filed suit in the United States District Court for the Northern District of Georgia on March 26, 1997, seeking relief from prosecution under the burial ordinance and requesting injunctive relief to enjoin that prosecution, alleging that they had no adequate remedy at law (R1-1; Complaint para. 79). Before the District Court, Welch and Hamrick alleged that they were at risk of being arrested and placed in jail if they failed to appear for trial

of the citation and accusation in the Mountain City Recorder's Court and that Mountain City should be restrained and enjoined from prosecuting them under the Burial Ordinance. Among numerous other allegations in the Federal District Court complaint, Welch and Hamrick asserted that the Burial Ordinance was unconstitutional.

The Town of Mountain City; Grace Watts, Carolyn Holt and Wilma McCrackin, in their representative capacities as Mayor and members of the Council of the Town of Mountain City, and Grace Watts, Carolyn Holt and Wilma McCrackin, in their individual Capacities, answered the Complaint, asserting that the issues raised in the Complaint were "not ripe for determination" before the District Court as they were currently the subject of pending litigation in the Recorder's Court of Mountain City (R1-9).

These parties also filed a Motion for Summary Judgment setting forth the argument that Welch and Hamrick did not meet their burden under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) to show irreparable injury or threat of immediate injury if the Recorder's Court prosecution was not enjoined (R1-21;22;23). Therefore, they did not present the District Court with grounds for avoiding the abstention doctrine.

The District Court ruled that the abstention doctrine espoused in *Younger v. Harris* required that the United States District Court refrain from adjudicating the claims of Welch and Hamrick for declaratory and injunctive relief, due to the pending Recorder's Court litigation, within which they could raise the question of the constitutionality of the Ordinance and have the Recorder's court adjudicate the issue (Petitioners Appendix 3a).

Welch and Hamrick appeal that ruling arguing essentially two points: (1) that the parties waived the application of the abstention doctrine by agreeing to abate the municipal Recorder's Court proceeding in favor of having the Federal District Court rule on the issue of constitutionality of the ordinance; and (2) that this case falls within the exceptions to the application of the abstention doctrine on three grounds and on those exceptions, the District Court should have adjudicated the merits of the constitutional claims.

On appeal to the Eleventh Circuit Court of Appeals, the District Court opinion was affirmed, per curiam (Petitioners' Appendix 1a).

SUMMARY OF ARGUMENT

The District Court ruled that the abstention doctrine espoused in *Younger v. Harris* required that the United States District Court refrain from adjudicating the claims of Welch and Hamrick for declaratory and injunctive relief, due to the pending Recorder's Court litigation, within which they could raise the question of the constitutionality of the Ordinance and have the Recorder's Court adjudicate the issue (Appellants' Excerpts at #47).

Respondent Town of Mountain City did not waive the application of the abstention doctrine. Respondent agreed to abate the Recorder's Court proceeding solely to avoid duplication of effort. There is no hindrance to the adjudication of the constitutional claims in the Recorder's Court. Petitioners cannot demonstrate that any recognized judicial exception to abstention is present in this case.

This case is controlled by the opinion in *Younger v. Harris* and the order on appeal should be affirmed.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT DID NOT ERR BY DECLINING TO EXERCISE JURISDICTION OVER ISSUES PENDING IN A STATE COURT PROCEEDING WHERE THE PARTIES AGREED TO ABATE THE STATE COURT PROCEEDING AND PROCEED WITH THE SAME ISSUES BEFORE THE FEDERAL DISTRICT COURT.

In the case at bar there was no consent or waiver of the Recorder's Court adjudication of the merits of the constitutional claims. The Record reflects that Mountain City contended, in their Response to Welch and Hamrick's Motion for Summary Judgment that by agreeing to stay the prosecution in the Recorder's Court, Mountain City did not waive the application of the abstention doctrine to this case. The Mountain City Defendants acknowledged that there was a potential for duplication of effort if the matters proceeded before both courts and therefore sought to avoid that by agreeing to abate the Recorder's Court proceeding pending some direction from the Federal District Court. The Petitioners conceded this at page 11 of their initial brief wherein they state:

> *. . . both sides had legitimate reasons for agreeing to suspend criminal prosecution pending rulings by the district court on the opposing motions for summary judgment and*

> *plaintiffs' motion for declaratory judgment. Neither side wanted to spend the time and money necessary for a trial which would have lasted several days and involved a multitude of witnesses without knowing if the Burial Ordinance met constitutional muster, procedurally and/or substantively.*

Petitioners did not contend that there was any bar to proceeding in the Recorder's Court. This Respondent asserted the abstention bar before the District Court.

Petitioners Welch and Hamrick were seeking, in effect, a declaration of the constitutionality of the ordinance on its face. However, there has been no showing on this appeal that such decision was not within the Recorder's Court's jurisdiction to decide. The District Court recognized this at page 6 of its opinion where it stated:

> *The court has no reason to believe that plaintiffs [Welch and Hamrick] would not be afforded adequate protection if they raised their constitutional challenge to the Burial Ordinance in the Recorder's Court. . . . The court is aware of no procedural barrier which would prevent plaintiffs from raising their constitutional challenge as a defense to the criminal prosecution.*

The Petitioners do not contend that there was a procedural barrier to raising their constitutional claims in the Recorder's Court. Rather, they assert that the agreement to abate the Recorder's Court proceeding compelled the Federal District Court to adjudicate the matter on the merits.

The law provides that where there is an adequate opportunity to raise constitutional claims in the state judicial proceeding, even through an appeal, abstention operates to preclude Federal Court interference. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, which explained the *Younger* holding and why the Federal Court should not enjoin a pending state criminal proceeding, except in very unusual situations occurring when the federal plaintiff would not otherwise have a full and fair opportunity to litigate his constitutional claim. The court found that the prohibition of sex discrimination was a sufficiently important state interest and that Dayton would receive an adequate opportunity to raise its constitutional claims in state court judicial review of the administrative proceeding, which was provided for by statute. The Welch Petitioners have no bar precluding full and fair adjudication of their constitutional claims in state court.

Petitioners reference *Falanga, et al. v. State Bar of Georgia*, 1998 WL 493026 (11th Cir., 8/19/98), which states at footnote 2 that the parties signed a written agreement that the State Bar would not prosecute Falanga or Chalker until the district court resolved the lawsuit. They also substituted a nominal plaintiff to challenge the standards that Falanga and Chalker faced formal charges for violating. The district court accepted this agreement and declined to abstain from deciding the case. In *Falanga*, no party took issue with the district court's action to adjudicate the case. The appeals court found that it was within the court's authority to determine whether to accept the agreement since the abstention doctrine stated in *Younger* is not jurisdictional. In contrast, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 477 U.S. 619, 91 L. Ed. 2d 512 (1986), the court determined that the

District Court should have abstained from adjudicating the case under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1981). There, the Commission urged abstention and the Dayton Christian Schools, Inc., argued that the Commission waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. In the *Dayton Christian Schools, Inc.*, case the court noted that abstention does not arise from lack of jurisdiction in the District Court but from the policies counseling against the exercise of jurisdiction where particular kinds of state proceedings have already been commenced. The *Dayton* court said:

> A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. *See Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431f U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904, 52 L. Ed. 2d 513 91977); *Sosna v. Iowa*, 419 U.S. 393, 396-397, n.3, 95 S. Ct. 553, 555-556, n.3, 42 L. Ed. 2d 532 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

In this case there was no waiver or consent to proceed on the merits, clearly expressed or urged by Mountain City.

Mountain City's stipulation was solely to avoid duplication of judicial efforts — not to avoid the operation of the abstention doctrine. There were adequate due process protections available to protect the Petitioners' right to raise the constitutional challenge to the Burial Ordinance in the Recorder's Court. In the absence of any argument or showing to the contrary, the District Court correctly applied the abstention doctrine and dismissed this matter to proceed before the Recorder's Court.

II.

THE DISTRICT COURT DID NOT ERR IN FINDING NO FACTS TO SUPPORT THAT THIS CASE FALLS WITHIN ANY EXCEPTION TO THE APPLICATION OF THE ABSTENTION DOCTRINE.

Petitioners argue, in the alternative, that if *Younger v. Harris* controls in this matter, then the exceptions to abstention compel a reversal of the order on appeal.

Petitioners' brief asserts (but fails to demonstrate) those reasons which the law treats as judicial exceptions to the application of the abstention doctrine:

> *During all this lapse of years from 1793 to 1970, the statutory exceptions to the 1793 congressional enactment*[1] *have* been only three; *(1) "except as expressly authorized by Act of Congress"; (2) "where necessary in aid of its*

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1. *"In 1793, an Act unconditionally provided: '(N)or shall a writ of injunction be granted to stay proceedings in any court of a state * * *.'* 1 Stat. 335, c. 22, s 5."

> *jurisdiction"; and (3) "to protect or effectuate is judgments." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. . . . [Citation omitted].*
>
> *The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.*

Younger, 91 S. Ct. 746, * * * 749; 401 U.S. 43-44. The court went on to state that the fundamental purpose of restraining equity jurisdiction prevented erosion of the role of the jury and avoided a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

The *Younger* opinion quotes a unanimous Supreme Court opinion that supported abstention in a matter where state criminal proceedings not yet formally instituted but sought to be enjoined were not enjoined by the federal courts because there was no necessity for protection of constitutional rights.

> *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, *and following cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.*

Id., at 243-44, 46 S. Ct. at 493.

The Supreme Court has consistently held that irreparable injury must be shown; that is the traditional prerequisite to obtaining injunctive relief. However, a second requisite, against federal interference, is that the injury alleged is both great and immediate. *Fenner v. Boykin*, 271 U.S. 240, 46 S. Ct. 492, 70 L. Ed. 2d 927 (1926); *Younger v. Harris* at 401 U.S. 37, 44, 91 S. Ct. 746, 750.

In the case at bar, Welch and Hamrick are subject to the proceeding for violation of an ordinance, of which they had notice and knowingly and deliberately violated. It

should be noted that they had the opportunity to approach City Council when the ordinance was being discussed, when it was enacted and they could have sought relief from the operation of the ordinance prior to acting in violation of it. Petitioners have not shown that there is a reason that they should be immune from prosecution for violation of the ordinance. The Record supports that they acted deliberately and with knowledge that they were placing themselves in the position of being prosecuted for violating the ordinance, just as any other citizen would be prosecuted for a similar violation. Their claimed injury is that incidental to every criminal proceeding brought lawfully and in good faith. *See Douglas v. City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324) (1943).

Petitioners assert that they will be subject to repeated prosecution for the same offense. This assertion arises, presumably from the language of the ordinance treating the offense as one continuing as long as the violation exists. However, this is a singular prosecution and assuming that the proceeding goes forward in regular form in the Recorder's Court there will be but one prosecution for the acts alleged in the pending accusation. Again, the continuing nature of the fine which may be imposed does not translate into separate prosecutions. Respondent hastens to point out that the continuing fine could have been avoided altogether by Petitioners if Petitioners had sought relief and determined their rights prior to carrying out their father's burial, subsequent to passage of the ordinance. They elected to take the risk of being subjected to the fine. There is therefore no support for the assertion of repeated prosecutions or that the sanction they face is unfair.

Moreover, Appellants have the right to contest any fine as excessive, should the Recorder's Court find against them.

Addressing the argument that the ordinance is unconstitutional on its face, the *Younger* opinion speaks directly to such allegation and finds at 401 U.S. 37, 49, 91 S. Ct. 746, 753, that this assertion as grounds for asserting that the operation of it should be enjoined is "*. . . fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision*; . . .". In other words, in the absence of a justiciable controversy, the court would be passing judgment on a law which it had not yet been called upon to enforce. There, the court expressed its reluctance to ever conclude that a federal court could properly enjoin enforcement of a statute solely on the basis of a showing a constitutional infirmity 'on its face'. The *Younger* court outrightly rejected that facial unconstitutionality would justify injunctive relief against good faith attempts to enforce the law, in the absence of any showing of bad faith, harassment or other unusual circumstances. Appellees hasten to point out that those unusual circumstances do not exist in the case at bar.

Petitioners' argument on this point seeks to have this court address the merits of the constitutionality of the ordinance on its face, which is just what *Younger* rejected, as discussed above. Petitioners assert that the accusations pending against them were brought in bad faith and for purposes of harassment. However these assertions are wholly unsupported by any facts relevant to a showing of a denial of due process which precludes Petitioners from raising the constitutional issues before the Recorder's court. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*

Petitioners obviously considered their opportunity to talk to the City Council before the August 4 burial of their father. (Petitioners' Eleventh Circuit brief at page 27) However, they made no effort to formally appear before the council before going forward with their burial plans. Petitioners were on notice that the ordinance passed July 9, 1996. The claim that they were singled out and harassed is hardly credible where the Record shows that they affirmatively stated to council members that they would go forward with their burial plans regardless of any ordinance prohibiting it. Petitioners had no vested right to ignore existing law.

Fundamentally, the Petitioners have failed to establish on this appeal that they made a showing of great and immediate irreparable injury which would duly prompt the Federal District Court to remove the case from operation of the doctrine of abstention.

This was the argument made by Respondent in the response to Welch and Hamrick's Motion for Summary Judgment; that there was no immediate threat of injury to Welch or Hamrick which would demonstrate that they were entitled to avoid the Recorder's court proceeding via filing a Complaint for injunctive relief in the district court on the assertion of constitutional rights violation. Petitioners fail to acknowledge that they had the opportunity to seek a determination from the Recorder's court as to the constitutionality of the ordinance and then to appeal that decision, if it was adverse to their position.

The Petitioners' Brief does not even address the fact that they have the right to proceed, with no procedural barrier to a full adjudication of their constitutional claims in the Recorder's Court.

CONCLUSION

The Federal District Court determined that this case involves the exact situation to which *Younger v. Harris* applies. The Eleventh Circuit's affirmance of that decision is correct. No conflicting holdings within the federal circuits is presented by Petitioners. Petitioners have not presented any argument meriting certiorari review by this Court.

WHEREFORE Respondent Town of Mountain City prays that this Court deny this petition for a writ of certiorari as the decision below is correct and without error.

Respectfully submitted,

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